

1  
2  
3  
4  
5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,  
8 Plaintiff,

9 -vs-

10 JOSE MOJICA-LINOS,  
11 Defendant.

NO. CR-05-2078-WFN

ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS INDICTMENT

12  
13 Pending Before the Court is the Defendant's Motion to Dismiss the Indictment (Ct.  
14 Rec. 23). The Court heard oral argument on October 25, 2005. Defendant was present and  
15 represented by Kurt Rowland; Assistant United States Attorney Shawn Anderson represented  
16 the Government. For the reasons discussed below, the Court grants the Defendant's motion.

17 **I. BACKGROUND**

18 The Defendant initially entered the United States as a young man. On October 20,  
19 1988 he applied for and received temporary residency. The Defendant was granted the status  
20 of a lawful permanent resident on December 1, 1990; however, in 1993, he was convicted of  
21 vehicular homicide and sentenced to 27 months imprisonment. A review of the documentation  
22 pertaining to the vehicular homicide conviction reveals that the Defendant was charged in the  
23 alternative under RCW 49.61.520(1)(a) & (b), which together provide:

24 When the death of any person ensues within three years as a proximate result of  
25 injury proximately caused by the driving of any vehicle by any person, the  
26 driver is guilty of vehicular homicide if the driver was operating a motor  
vehicle: (a) While under the influence of intoxicating liquor or any drug, as  
defined by RCW 46.61.502; or (b) In a reckless manner . . . .

1 R.C.W. 49.61.520(1)(a)-(b) (emphasis added).

2 The Defendant's Judgment and Sentence references both subsections and the  
3 Statement of Defendant on Plea of Guilty does not qualify whether the conviction was  
4 under subsection (a) or (b). Nevertheless, the facts support that the conviction was likely  
5 under (a), which criminalizes a death which results from driving while under the influence of  
6 alcohol.<sup>1</sup>

7 On or about April 11, 2001, the INS served the Defendant with a Notice to Appear for  
8 deportation proceedings. On May 22, 2001, the Immigration Judge ("IJ") determined that the  
9 Defendant was removable because he had been convicted of vehicular homicide, which the  
10 IJ classified as an aggravated felony under the immigration laws. The IJ also informed the  
11 Defendant that he was not eligible for relief under § 212(c) of the immigration law because  
12 he had not accrued seven years of lawful domicile prior to his conviction for vehicular  
13 homicide. The Defendant was deported on July 20, 2001.

14 The Defendant attacks the validity of his deportation on two bases: (1) the IJ erred by  
15 informing him that he was ineligible for § 212(c) relief because under established Ninth  
16 Circuit law, the time period of lawful domicile runs from the date of application for temporary  
17 residency to the date the INS serves the Notice to Appear; and (2) his conviction for vehicular  
18 homicide does not constitute an aggravated felony under either the categorical or modified  
19 categorical approach.

20  
21  

---

22 <sup>1</sup>The Defendant's statement was as follows: "On or about the 4th of February, 1993 in  
23 Adams County, Washington, at the corner of SR 24 and Bench road I did not see the stop  
24 sign, drove into the intersection and the car I was driving collided with another car. As a  
25 result of the collision Socorro C. Soto died. At the time I was under the influence of alcohol,  
26 Blood Alcohol .16."

## II. ANALYSIS

**A. Standard for Collateral Attack of Underlying Deportation.** "In a criminal prosecution under § 1326, the Due Process Clause of the Fifth Amendment requires a meaningful opportunity for judicial review of the underlying deportation." *United States v. Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998), *overruled on other grounds by United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc). "If the defendant's deportation proceedings fail to provide this opportunity, the validity of the deportation may be collaterally attacked in the criminal proceeding." *Id.* In order to succeed on such a collateral attack, the Defendant must demonstrate: "(1) his due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects." *Id.* The prejudice prong is satisfied when the alien demonstrates "plausible grounds for relief which might have been available to him but for the deprivation of rights." *Id.* at 1198 (citation omitted).

Prior to attacking the validity of the deportation in the § 1326 criminal proceedings, the statute requires the alien to first exhaust any available administrative remedies. *See* 8 U.S.C. § 1326(d). However, the Ninth Circuit has excused exhaustion for a defendant who waives his right to appeal from the deportation order without having first been informed of what relief may be available. *United States v. Muro-Inclan*, 249 F.3d 1180, 1884 (9th Cir. 2001); *see also United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004)(opining that the exhaustion requirement of § 1326(d) cannot bar collateral review of a deportation proceeding when the waiver of appeal did not comport with due process). The Government concedes that administrative exhaustion is not required in this case under the current Ninth Circuit law, but raises the issue in order to preserve it for appeal.

### **B. Section 212(c) Relief.**

**(1) Defect in the Proceeding.** "Where the record contains an inference that the petitioner is eligible for relief following deportation, the [Immigration Judge] must advise the

1 alien of this possibility and give him the opportunity to develop the issue." *United States v.*  
2 *Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000)(citation omitted). This requirement is  
3 "mandatory." *Id.* Advising an alien that he may be eligible for relief under § 212(c) of the  
4 immigration laws is one such requirement. *Ubaldo-Figueroa*, 364 F.3d at 1048-49.

5 Section 212(c) of the Immigration and Naturalization Act, formerly codified  
6 at 8 U.S.C. § 1182(c), provided that: "Aliens lawfully admitted for permanent residence who  
7 temporarily proceeded abroad voluntarily and not under an order of deportation, and who are  
8 returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted  
9 in the discretion of the Attorney General without regard to the provision of subsection (a)  
10 [classes of excludable aliens]." *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995).  
11 Therefore, an alien applying for relief under section 212(c) must demonstrate that he is a  
12 lawful permanent resident, and that he has maintained a "lawful unrelinquished domicile" in  
13 the United States for a period of seven consecutive years.

14 Lawful domicile is established for purposes of 212(c) relief when the alien  
15 applies for amnesty. *Ortega de Robles v. INS*, 58 F.3d 1355, 1360-61 (9th Cir.1995); *United*  
16 *States v. Jimenez-Marmolejo*, 104 F.3d 1083, 1086 (9th Cir. 1996). In determining when the  
17 period of lawful domicile terminates, the earliest date which would control is when the INS  
18 commenced deportation proceedings. *See Avila-Murrieta v. INS*, 762 F.2d 733, 735 (9th  
19 Cir.1985); *MartiXiques v. INS*, 741 F.2d 350, 355 (11th Cir.1984); *Lok v. INS*, 681 F.2d 107,  
20 110 (2d Cir.1982).

21 The Defendant was granted temporary residence on October 20, 1988. His  
22 status was adjusted to legal permanent resident on December 1, 1990. The date the INS  
23 commenced deportation proceedings in this matter was April 17, 2001. Therefore, at the time  
24 of the Defendant's deportation hearing in 2001, he had accrued approximately 12 years of  
25 lawful domicile. Although the Government argued at the motion hearing that the IJ was  
26 correct in assuming that the period of lawful domicile ended when the Defendant was

1 *convicted* in state court in 1993, it offers no authority for this position. The IJ therefore erred  
2 when he advised the Defendant that he would not be eligible for 212(c) relief because he did  
3 not have the requisite period of lawful domicile. *See* Defendant's Memorandum in Support  
4 of Motion to Dismiss, Exhibit D.

5 Notwithstanding, there were certain classes of aliens who could not obtain  
6 212(c) relief even if they had the requisite period of lawful residency. At the time of the  
7 Defendant's state conviction for vehicular homicide, section 212(c) relief was unavailable to  
8 an alien convicted of an aggravated felony if the alien served a term of imprisonment of at  
9 least 5 years for the conviction. *See INS v. St. Cyr*, 533 U.S. 289, 297 (2001). In 1996,  
10 however, Congress expanded upon the list of criminal convictions which would prohibit §  
11 212(c) relief. Included in this expansion was any "aggravated felony" as defined under the  
12 immigration laws. *Id.*

13 Despite this change in the law, the Supreme Court has held that aliens who  
14 relied upon the existence § 212(c) in pleading guilty remain entitled to its protections even  
15 after its elimination. *St. Cyr*, at 295-96. The Government contends that this Court cannot  
16 retroactively apply the reasoning of *INS v. St. Cyr* (decided on June 25, 2001) to the  
17 Defendant's May 22, 2001 deportation hearing.<sup>2</sup> This argument, however, is misplaced.

18 The case cited by the Government in support of its "no retroactivity" argument  
19 is *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169 (9th Cir. 2001), which is a **habeas** case.  
20 That case is distinguishable because the Defendant in the matter *sub judice* is not mounting  
21 a collateral attack in a habeas proceeding; rather, he is attacking his underlying deportation  
22

---

23 <sup>2</sup>The IJ in this matter actually refers to the fact that *St. Cyr.* was pending in the Supreme  
24 Court. *See* Oral Decision of Immigration Judge ("[E]ven if the Supreme Court would agree  
25 with the Second Circuit's decision [in *St. Cyr.*], the respondent clearly would not have been  
26 eligible for 212(c) relief given the time sequence noted above.").

1 in his primary § 1326 criminal proceeding. *See United States v. Ubaldo-Figueroa*, 364 F.3d  
2 1042 (9th Cir. 2004)(applying the reasoning of *St. Cyr.* to a motion to dismiss § 1326 charges  
3 where the alien's underlying deportation hearing took place on March 31, 1998).

4 The *Ubaldo-Figueroa* decision also precludes the Government's argument that  
5 the Defendant needed to be eligible for 212(c) relief at the time of his state court plea.  
6 *Ubaldo-Figueroa*, at 1050 ("In *Leon-Paz*, we held that aliens like Ubaldo-Figueroa are  
7 entitled to § 212(c) relief even though they were not eligible for such relief when they pled  
8 guilty to their crimes--crimes which were later reclassified as aggravated felonies pursuant  
9 to IIRIRA § 321.")(emphasis added). As argued by the Defendant, the proper inquiry is  
10 whether he was eligible for § 212(c) relief at the time of his deportation hearing. He was, and  
11 the IJ's misinformation on the issue of § 212(c) relief was error.<sup>3</sup>

12 (2) **Prejudice.** Having determined that the IJ's error constitutes a defect in the  
13 proceeding, the Court turns to the issue of prejudice.

14 The prejudice prong is satisfied when the alien demonstrates "plausible  
15 grounds for relief which might have been available to him but for the deprivation of rights."  
16 *Zarate-Martinez*, 133 F.3d at 1198 (citation omitted). As stated above, § 212(c) relief may  
17 have been available to the Defendant at the time of his deportation hearing. The question then  
18 is whether it was plausible that § 212(c) relief would have been granted.

---

21 <sup>3</sup>Although the AUSA did **not** argue this factor as a basis for denying the motion to  
22 dismiss, the Court finds that the deportation proceedings are not saved by the IJ's bare  
23 statement that "he provided the respondent with the opportunity for an evidentiary hearing  
24 to explore any issue of "reliance" (?) on the availability of Section 212(c) relief . . . ." This  
25 statement is a nullity in light of the fact that the IJ thereafter informed the Defendant in no  
26 uncertain terms that he would not be eligible for § 212(c) relief.

1           The Defendant worked as an agricultural worker for several years as a lawful  
2 permanent resident. The Defendant also submitted two declarations which establish that he  
3 has an Aunt, Alva Fernandez-Linos, and a Cousin, Edith Fernandez, who are lawful  
4 permanent residents. The Defendant assisted his Aunt with financial support during the  
5 period of his lawful residency and transported his Cousin, Edith Fernandez, to school.  
6 "[Family ties], residence of long duration in this country, hardship to the alien and family if  
7 deported, history of employment, property or business ties, community service, and, when  
8 there is a criminal record, genuine rehabilitation," are some of the factors which are  
9 considered in determining whether § 212(c) relief is appropriate. *Kahn v. INS*, 36 F.3d 1412,  
10 1413 (9th Cir. 1994). The Defendant need not establish that it was likely that he would have  
11 avoided deportation, only that he had a *plausible* basis for relief. *See Zarate-Martinez*, at  
12 1198. The Government did not attempt rebut the Defendant's evidence; instead, the sole  
13 argument it offered in briefing and at oral argument is that prejudice cannot result from the  
14 IJ's failure to inform the alien of discretionary relief. Again, this argument is contrary to  
15 Ninth Circuit law. *See e.g., Ubaldo-Figueroa*, 364 F.3d at 1051. The Defendant has  
16 established that it was plausible that § 212(c) relief would have been granted; therefore, the  
17 prejudice prong is satisfied.

18           **C. Alternative Argument: Defendant Not Convicted of Aggravated Felony.** In  
19 the alternative, the Defendant argues that the IJ erred in determining that his conviction was  
20 for an aggravated felony.

21           The term "aggravated felony" in the immigration law includes, among other things,  
22 murder, rape, trafficking in a controlled substances, trafficking in firearms, as well as any  
23 "crime of violence" as defined in section 16 of Title 18 for which the term of imprisonment  
24 at least one year. 8 U.S.C. § 1101(a)(43). In the matter *sub judice*, the IJ determined that the  
25 Defendant was removable because he was convicted of a crime of violence, which is defined  
26 by section 16 as:



(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

*Leocal v. Ashcroft*, 125 S.Ct. 377, 380 (2004)(quoting 18 U.S.C. § 16).

In *Leocal*, the Supreme Court held that both subsections (a) and (b) of 18 U.S.C. § 16 require more than a *mens rea* of negligence in order for the conviction to qualify. *See id.* at 382-83; see also *See Lara-Cazares v. Gonzalez*, 408 F.3d 1217, 1219 (9th Cir. 2005)(gross vehicular manslaughter while intoxicated under California law is not a crime of violence under the immigration law because the required *mens rea* is gross negligence).

For Defendant's Washington state conviction for vehicular homicide, the statute of conviction provides:

When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle: (a) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502; or (b) In a reckless manner . . . .

R.C.W. 49.61.520(1)(a)-(b)(emphasis added). As discussed above, the Defendant's statement on plea of guilty was as follows: "On or about the 4th of February, 1993 in Adams County, Washington, at the corner of SR 24 and Bench road I did not see the stop sign, drove into the intersection and the car I was driving collided with another car. As a result of the collision Socorro C. Soto died. At the time I was under the influence of alcohol, Blood Alcohol .16."

The Washington statute that the Defendant was charged with violating does not **require** recklessness in order for a person to be convicted, i.e., it is over-broad under the *Taylor* categorical analysis because the Defendant could have been convicted on a showing of mere negligence. *See Taylor v. United States*, 495 U.S. 575 (1990). Moreover, the Defendant's statement on guilty plea actually supports that he was convicted under subsection (a), which is vehicular homicide committed while under the influence of intoxicating liquor.



1 Regardless, even if the conviction was based on recklessness, nothing in the documents that  
2 the Court may review for the modified categorical approach supports a finding that the  
3 defendant was, in fact, based on the recklessness prong of R.C.W. 49.61.520(1)(b). *See*  
4 *United States v. Kelly*, 422 F.3d 889, 895 (9th Cir. 2005) (“Under the modified categorical  
5 approach, the government has the burden to establish clearly and unequivocally the conviction  
6 was based on all of the elements of a qualifying predicate offense.”)(internal quotation marks  
7 and citation omitted). Therefore, the Defendant’s conviction, which could have been based  
8 on a *mens rea* of less than recklessness, does not qualify as a crime of violence under the  
9 immigration law. *See Lara-Cazares*, 408 F.3d at 1219.

### 10 III. CONCLUSION

11 The Defendant has demonstrated that his due process rights were violated by defects  
12 in his underlying deportation proceeding and that he suffered prejudice as a result. The July  
13 20, 2001 deportation cannot serve as a predicate element for the illegal reentry offense under  
14 8 U.S.C. § 1326. Accordingly,

15 **IT IS ORDERED** that:

- 16 1. The Defendant’s Motion to Dismiss the Indictment, **Ct. Rec. 23**, is **GRANTED**.
- 17 2. The Indictment is **DISMISSED** without prejudice.

18 The District Court Executive is directed to file this Order and provide copies to counsel.

19 **DATED** this 10th day of November, 2005.

20  
21 s/ Wm. Fremming Nielsen  
22 WM. FREMMING NIELSEN  
23 SENIOR UNITED STATES DISTRICT JUDGE  
24  
25  
26